No. 94-1379

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

JOSEPH R. MATTIOLI, ROSE MATTIOLI and THE POCONO INTERNATIONAL RACEWAY, INC.,

Petitioners,

vs.

TUNKHANNOCK TOWNSHIP, TUNKHANNOCK TOWNSHIP RESIDENTS COMMITTEE, CHARLOTTE DAVENPORT, JAMES G. DAVENPORT AND JAMES R. DAVENPORT and THE CORTRIGHT ROAD RESIDENTS,

Respondents.

On Petition for Writ of Certiorari to the Commonwealth Court of Pennsylvania

BRIEF IN OPPOSITION FOR RESPONDENT TUNKHANNOCK TOWNSHIP

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QUESTION PRESENTED

Does a court violate individual due process and equal process rights simply by exercising its discretion in denying an application by an automobile racetrack to become its own borough?

LIST OF PARTIES

Petitioners:

Joseph R. Mattioli, Rose Mattioli and The Pocono International Raceway, Inc.

Respondents:

Tunkhannock Township; Tunkhannock Township Residents Committee; Charlotte Davenport, James G. Davenport and James R. Davenport; The Cortright Road Residents

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The lower court's denial of the Pocono International Raceway's application to incorporate as a borough did not violate the equal protection rights of the individual family members who owned the racetrack and adjacent real estate, nor did it violate those family members' due process rights by applying a subsequent state statute creating a minimum of 500 individuals in order to incorporate a new borough.	4
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In re Incorporation of Borough of New Morgan, 527 Pa. 226, 590 A.2d 274 (1991) 9

Statutes Cited:

28 U.S.C. § 1257(a) 1

53 P.S. § 45202(c), 1966, February 1, P.L. (1965) __, No. 581, Section 202. As Amended 1981, July 10, P.L. 247, No. 80, § 1 ..... 8, 11

OPINIONS BELOW

The opinions of the intermediate appellate court, the Commonwealth Court of Pennsylvania, and the trial court, the Court of Common Pleas of Monroe County, Pennsylvania, are appended to petitioners' brief.

STATEMENT OF JURISDICTION

Petitioners claim jurisdiction based on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners quote the applicable constitutional and state statutory provisions in their brief.

STATEMENT OF THE CASE

A. Procedural History

On October 5, 1992, Petitioner, Pocono International Raceway and Joseph and Rose Mattioli, filed a Petition for the Incorporation of Borough of Pocono Raceway with the Monroe County Court of Common Pleas. The raceway is located in Tunkhannock Township.

Tunkhannock Township filed timely exceptions to the petition. On May 5, 1993, a hearing was held on those exceptions before the Honorable James R. Marsh, the lower court judge. On September 1, 1993, Judge Marsh dismissed the exceptions as to the number and sufficiency of the signatures on the petition, and reserved ruling on the geographic integrity issue until a court-appointed citizens advisory committee had completed its hearings and made their recommendations to the Court.

Judge Marsh also entered an Order appointing the citizens advisory committee. Committee hearings were held during the week of October 4, 1993.

On November 18, 1993, the citizens advisory committee rendered its recommendation to the court. On December 20, 1993, Judge Marsh issued an Opinion and Order denying the Petition for Incorporation. Petitioners filed motions for post trial relief which were denied by the court on January 19, 1994.

Petitioners appealed to Pennsylvania's intermediate appellate court, the Commonwealth Court of Pennsylvania. On July 13, 1994, that court affirmed the decision of the Monroe County Court of Common Pleas. On November 17, 1994, the highest state appellate court, the Pennsylvania Supreme Court, denied Petitioners' request for an allowance of appeal to that Court.

B. Factual History

Petitioners filed a Petition for Incorporation seeking to incorporate certain land which was located within Tunkhannock Township, Monroe County. The averments in the petition were silent as to the number and identity of the freeholders, Petitioners simply averred that they were the majority of the freeholders.

The Petitioners' exhibits, however, identified eight freeholders. The existence of those freeholders was disclosed on the face of the plot plan.

The petition was signed by only two of the eight freeholders. The only signatories to the petition were the Pocono International Raceway, Inc. and the Mattiolis. Matco, Inc., another freeholder, did not sign or execute the Petition for Incorporation.

The record also discloses that the proposed borough boundaries would result in a small portion of Long Pond Road remaining within the jurisdictional boundaries of the Township and would be wholly surrounded and isolated within the boundaries of the proposed borough. That configuration isolated and cut off any jurisdictional linkage between that segment of Long Pond Road and the remainder of the Township.

Finally, the record disclosed that the boundaries of the proposed borough would traverse and include segments of Long Pond Road and State Route 115. This configurement isolated and cut off the Township's direct jurisdictional linkage between all of the areas of the Township, over and through the two main thoroughfares within the Township.

The present actual financial and tax effect on Tunkhannock Township was admitted by all sides as substantial. In 1992, the total revenues collected by the Township amounted to $502,000 with the land within the proposed borough generating between $5,000 to $6,000 in real property taxes and $132,000 in amusement taxes. That $137,000 to $138,000 in revenue represented approximately one-third of thirty percent of the revenue collected by the Township. In 1993, the Township has received $293,414 in revenue through September. Of that, the land within the proposed borough generated between $5,000 to $6,000 in real property taxes and $152,000 in amusement taxes. That $157,000 to $158,000 in revenue represents approximately one-half or fifty percent of the revenue collected by the Township as of the date of the hearings.

Tunkhannock Township consists of 24,800 acres. Over one-half or 12,979 acres are currently non-taxable properties owned by such entities as the Commonwealth of Pennsylvania: State Forest and Game Lands (3,700 acres), Bethlehem Water Authority (8,000 acres), the Nature Conservancy (865 acres),

Tunkhannock Township (8 acres) and Monroe County (406 acres). Such acreage does not generate tax revenue for the Township and that land is not available for development.

The proposed borough is 1,026 acres in size and of that currently 706 acres is zoned Highway Commercial. It would be extremely difficult given the remaining developable land available to Tunkhannock Township to rezone another area or areas of the Township to make up for the substantial loss were the borough to be incorporated as a separate municipal entity.

REASONS FOR DENYING THE WRIT

THE LOWER COURT'S DENIAL OF THE POCONO INTERNATIONAL RACEWAY'S APPLICATION TO INCORPORATE AS A BOROUGH DID NOT VIOLATE THE EQUAL PROTECTION RIGHTS OF THE INDIVIDUAL FAMILY MEMBERS WHO OWNED THE RACETRACK AND ADJACENT REAL ESTATE, NOR DID IT VIOLATE THOSE FAMILY MEMBERS' DUE PROCESS RIGHTS BY APPLYING A SUBSEQUENT STATE STATUTE CREATING A MINIMUM OF 500 INDIVIDUALS IN ORDER TO INCORPORATE A NEW BOROUGH.

The lower court did not violate the equal protection and due process rights of the Mattioli family in denying their request for incorporation as a borough in the Commonwealth of Pennsylvania. The Raceway's petition had several defects.

Geographical integrity is a critical condition enunciated time and again in Pennsylvania appellate court decisions. Those appellate courts recognize that integrity as an indispensable factor in examining or reviewing incorporation petitions to determine if those petitions will create a "harmonious whole". *In*

re Borough of Glen Mills, 125 Pa. Cmwlth. Ct. 604, 558 A.2d 592 (1989).

Like the proposed borough in the *Glen Mills* case, the proposed borough of Pocono Raceway would isolate a segment of land, with residential dwellings, which would not be contiguous to any portion of the township except for a narrow connection along a tract known as lot number .0746. The lower courts' properly found that the creation of such a peninsula of Tunkhannock Township residents would have had an adverse effect on Tunkhannock Township, as well as those residents.

In *Glen Mills,* the proposed borough's boundaries excluded certain properties that the petitioning school did not own. The configuration wholly isolated an unused parcel of land next to the railroad tracks, a portion of land on which the federal post office was located, an unused township field house and a segment of land zoned residential that would not be contiguous to any portion of the township, except for a narrow connection at the northeastern neck of this area.

Here, the Raceway's petition isolated twenty-three residential lots and a portion of Long Pond Road, which would have remained as part of Tunkhannock Township. This is so even though the peninsula would have been wholly within the boundaries of the proposed borough, except for the connection with the Township which exists at lot number .0746. The lower courts properly relied on the *Glen Mills* case in rejecting the Raceway's argument that because of the minor nexus to the Township, that there was no adverse effect on those isolated Tunkhannock Township residents.

The *Glen Mills* court held:

> Regardless of the fact that township residents would still have access to, and use of, these properties, we believe the present and future use of those areas, however insignificant, and their location within township jurisdiction, remain matters of concern for the township. Conceivably, Glen Mills could sell its land or change its zoning. The township has a rational justification to maintain linkage with all land within its jurisdiction . . .
>
> For example, if the proposed borough ever changed the land use northwest of those township residents' property, the value or utility of that property may be affected. The owners, whose collective properties would be surrounded on all sides by municipalities other than Thornbury Township, formerly protected by the township's comprehensive zoning scheme, would have no voice in determining the treatment of the substantial area (the proposed borough) lying between them and the rest of the township . . .
>
> The concept here presented strikes at the very root and concept of government, most certainly democratic government as we understand it in America, which always rests upon the union of a group of freeholders into a self governing unit, wherein divergent groups and people through the vote express their majority will and voice.

> Here we have one landowner who now says I want to separate and govern myself.
>
> If this were allowed, how far would it go: colleges, universities, sundry institutions, corporations, large land owners, perhaps smaller too, would break off at will from Townships and into multi-separate boroughs. Each borough going its own way to create a mix of perhaps harmonious, perhaps antagonistic, but incongruous zoning or development patterns, as well as conflicting and often inconsistent services. The potential for exclusion, exploitation and overreaching becomes real and ever present.
>
> Suppose the Glen Mills School sold its property and moved, one whole Borough would then be bought, and available for unbridled and unrestricted control, except as the Borough Code might provide . . .
>
> In the end we have not come so far in our evolving history to now go backward creating what would ultimately become feudal-like estates. This is certainly not the acceptable or reasonable basis and approach to local government.

In re Borough of Glen Mills, 125 Pa. Cmwlth. Ct. 604; __, 558 A.2d 592, 594-95 (1989).

The lower courts properly recognized the concerns of isolating certain Township residents. As accurately pointed out in the *Glen Mills* case, petitions for incorporation are not bound to

development plans they submit to a citizens advisory committee for review.

Here, the Raceway's promises, representations, or expressions of good intentions do not bind them to any plan of development or use of their property incorporation. To the contrary, upon incorporation the Raceway or any successor to their title in their land can, and would have the power to enact and implement any scheme for development and any zoning, subdivision and land use legislation they so desire. This legislation would have a strong potential to adversely affect the isolated Tunkhannock Township residents.

The lower courts also properly exercised their discretion in finding that the proposed Borough of Pocono Raceway was not one harmonious whole with common interests and problems best served by borough government. Here, the proposed borough's land does not have any existing development, beyond that of a racetrack and a few residential dwellings. This land was wholly within the confines of Tunkhannock Township, and primarily zoning highway commercial with a small portion zoned residential. There was no evidence in the record that any development planned by the Raceway was inconsistent with the Township's existing zoning and subdivision land use ordinances. Clearly, there was simply no need for the Raceway to incorporate as its own separate municipal entity.

53 P.S. § 45202(c)(3) (Borough Code) requires a consideration of financial or tax effects on the proposed borough as well as the existing governmental unit. Here, the courts considered the effect on Tunkhannock Township as a result of incorporation.

In considering the loss of taxes and fees, the proper focus is on those taxes and fees which may be presently lost, not those

which may be lost in the future. *In re Incorporation of Borough of New Morgan,* 590 A.2d 274, 279 (Pa. Super. 1991).

Tunkhannock Township's 1993 revenue produced from the land within the proposed borough was in excess of $157,000. The Township's total revenue for 1993 was $293,414 as of the date of hearing. The loss of that revenue from the proposed borough's confines was substantial, and certainly provided a basis for the lower courts' refusal to grant the Petition for Incorporation.

The revenues generated by the land within the proposed borough in 1982 amounted to approximately one-third of the total revenues received by Tunkhannock Township that year. Due to the magnitude of this financial loss of Tunkhannock Township, this loss would have been difficult for the township to cure. Tunkhannock Township is primarily a rural area with little economically developable land. The population is limited, and the income levels of those persons are low.

The substantial and significant loss of revenue from the Racetrack would limit the township's ability to produce meaningful revenue to offset such loss.

In the case of the *Incorporation of the Borough of Bridgewater,* 87 Pa. Cmwlth. Ct. 599, 488 A.2d 374 (1985), the trial court found that the surrounding Township had several debts, and concluded that the proposed borough sought to escape supporting the financially troubled township. The Commonwealth Court held:

> . . . While acknowledging that the proposed Borough would probably be able to take care of itself financially, by imposing a real estate tax, the trial court held that the remained of the Township would be deprived

> of the "support and balance which is essential to preserve and develop a complete, integrated and, yet, diverse community of population, interests, and uses; all of which are essential to the stability and growth of a suburban municipality".
>
> We cannot fault the trial court in its concern for preserving the diversity of the Township necessary to support it financially and socially. Therefore, we hold that the trial court properly exercised its discretion under Section 202 in denying the Petition to Incorporate.

488 A.2d at 377.

Clearly, the financial impact on Tunkhannock Township provided sufficient basis for the lower courts to deny the petition.

Petitioners finally argue that the Common Pleas Court improperly referred to the Pennsylvania state legislature's subsequent legislation creating an application process for borough incorporation requiring a minimum of 500 signatures. Petitioners argue that the trial court improperly relied on the state statute in exercising its discretion to deny the application for incorporation. In its opinion, the lower court judge simply recognized the existence of the legislation in his opinions. In the court's opinion of December 20, 1993, the judge stated:

> We note that recently the legislature has addressed this concern . . .
>
> We recognize that the new population requirement does not apply to this case.

> Under Section 3 of Act 1992, Dec. 18, P.L. __, No. 181, the new statute applies to applications and petitions presented on or after March 25, 1992, except in counties of the fifth class, where this act shall apply to applications and petitions presented on or after the effective date of this act. Although it is not applicable in the present case, we believe it is important to note the legislative change.

Opinion of December 20, 1993.

In the court's opinion of January 19, 1994, the judge stated:

> Second, the Petitioners alleged that the Court improperly considered the provisions of Act No. 181 of 1992. The Court clearly stated within its Opinion that this Act did not apply to the present Petitions. The Court merely noted the change in requirements under the Act and did not use the Act as a basis for its Opinion. This reference to the Act is dicta, and thus, we find this argument to be without merit.

Opinion of January 19, 1994.

The Common Pleas Judge could not mark that the court was not relying on the 1992 Amendments to 53 P.S. §§ 45201, *et seq.* in denying the application. The lower courts had statutory authority to determine the desirability of the incorporation of the Raceway as its own borough. The Commonwealth Court and the Court of Common Pleas properly denied the application request after reviewing the report and recommendation from the advisory

committee, as well as holding hearings on the application. Petitioners' equal protection rights and due process rights were not violated by this judicial process. Simply because the lower courts, as affirmed by the Commonwealth Court of Pennsylvania, found that the incorporation should not occur, does not rise to the level of a constitutional violation of the petitioners' constitutional rights.

CONCLUSION

The United States Supreme Court should deny Joseph R. Mattioli, Rose Mattioli and The Pocono International Raceway, Inc.'s Petition for Writ of Certiorari, because the case presents no issue appropriate for the Court's review, and because the lower courts' holdings were not in error.

Respectfully submitted,

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